

**IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 21 OF 2019-20**

BETWEEN

**M/S AL GHURAIR PRINTING AND
PUBLISHING LLC.....APPELLANT**

AND

**NATIONAL ELECTORAL COMMISSION.....1ST RESPONDENT
M/S REN-FORM CC2ND RESPONDENT**

DECISION

CORAM

- | | |
|-------------------------------------|-----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. CPA. Fredrick Rumanyika | - Member |
| 4. Adv. Rosan Mbwambo | - Member |
| 5. Ms. Florida Mapunda | - Ag. Secretary |

SECRETARIAT

- | | |
|------------------------|-----------------|
| 1. Ms. Violet Limilabo | - Legal Officer |
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FOR THE APPELLANT

- | | |
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| 1. Mr. Herman Kilenzi | Advocate, Blue Ice Attorneys |
| 2. Mr. Godlove Godwin | Advocate, Blue Ice Attorneys |
| 3. Mr. Chase Musiba | Country representative |
| 4. James Kinunda | Country representative |

FOR THE 1ST RESPONDENT

- | | |
|--------------------------|----------------------------------|
| 1. Mr. Gabriel P. Malata | Deputy Solicitor General |
| 2. Mr. Emmanuel Kawishe | Director of Legal Services – NEC |



- | | |
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| 3. Mr. Emmanuel Urembo | Director of Procurement and
Logistics - NEC |
| 4. Mr. Stanley Kalokola | State Attorney, OSG |
| 5. Ms. Lilian Machagge | State Attorney, OSG |
| 6. Ms. Pauline F. Mdendemi | State Attorney, OSG |

FOR THE 2ND RESPONDENT

- | | |
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| 1. Ms. Mwajuma Choggy | Advocate, Msc Legal Consultancy |
| 2. Mr. Musa Fikiri | Procurement Specialist, Varicky
Co. Ltd, Consulting Firm |

The Appeal was lodged by M/s Al Ghurair Printing and Publishing LLC (hereinafter referred to as "**the Appellant**") against the National Electoral Commission commonly known by its acronym NEC (hereinafter referred to as "**the 1st Respondent**") and M/s REN-FORM CC (hereinafter referred to as "**the 2nd Respondent**").

The Appeal is in respect of Tender No. IE/018/2019/2020/HQ/G/GE/13 for Supply of Printed Ballot Papers (hereinafter referred to as "**the Tender**").

The Tender was conducted competitively through online system (TANePS) as per the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as "**the Act**") and the Public Procurement Regulations, GN. No. 446 of 2013 and GN. No. 333 of 2016 (hereinafter referred to as "**the Regulations**").



The Respondent advertised this Tender through the TANEPS website on 9th March 2020. The same advertisement was issued in the Daily News newspaper of 10th March 2020 and the East African of 14th March 2020. The deadline for submission of Tenders was initially set for 31st March 2020 but it was later on extended to 8th April 2020. Only three tenderers, the Appellant inclusive, responded to the invitation and their tenders were publicly opened through TANEPS system.

Tenders were then subjected to evaluation which was conducted into four stages namely; preliminary, technical, detailed and post-qualification. During preliminary evaluation one tender was found to be non-responsive for quoting partial quantity of Sample Tactile Ballot Folders and Tactile Ballot Folders contrary to Clause 15.2 of Instruction to Tenderers (hereinafter referred to as the **ITT**). The remaining two tenders were subjected to Technical Evaluation whereby the Appellant was disqualified for failure to attach Declaration of Litigation Records contrary to Clause 13(d) of Tender Data Sheet (hereinafter referred to as the **TDS**). The remaining tenderer, M/s Ren-Form CC was subjected to detailed evaluation and later on post qualification. The tenderer was found to be responsive and was recommended for award of the Tender at a contract price of Tanzanian Shillings 18,085,226,628.10 (Eighteen Billion Eighty Five Million Two Hundred Twenty Six Thousand Six Hundred Twenty Eight Cents Ten only), exclusive of taxes and subject to successful negotiations.

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The recommendations of the evaluation committee were submitted to the Tender Board at its meeting held on 14th April 2020 whereby the award was approved subject to successful negotiations.

Negotiations took place on 24th and 25th April 2020, whereby several issues were discussed including reduction of price by considering the prevailing market prices, confirmation of packing of ballot papers, confirmation of compliance with delivery schedules etc. The Tender Board through Circular Resolution dated 4th May 2020 approved minutes of negotiations and award proposed to the successful tenderer (the 2nd Respondent).

On 06th May 2020, the 1st Respondent issued the Notice of Intention to award the Tender to all tenderers who participated in the Tender process. The Notice informed the bidders that the Tender is intended to be awarded to M/s Ren-Form CC at a contract price of Tanzanian Shillings 14,400,361,647.38 (Fourteen Billion Four Hundred Million Three Hundred Sixty One Thousand Six Hundred Forty Seven Cents Thirty Eight only), without Taxes under CIF Incoterm. The said notice also informed the Appellant that, its tender was disqualified for failure to attach Litigation Records contrary to Clause 13(d) of the TDS.

Dissatisfied with reason given for its disqualification, on 07th May 2020, the Appellant applied for administrative review to the 1st Respondent. On 12th May 2020, the 1st Respondent issued a decision which dismissed the Appellant's application for administrative review. The decision also indicated that the Appellant's tender was found with other shortfalls, hence



the 1st Respondent's Accounting Officer ordered re-evaluation of the tenders. On 15th May 2020 the 1st Respondent issued the result of the re-evaluation process which indicated on the side of the Appellant that, it failed to attach a copy of company's code of conduct/anti-bribery policy and the attached Power of Attorney was defective in that the donor was not among the owners (Directors) of the Company hence not eligible to grant such powers to donee. Aggrieved by the 1st Respondent's decision, on 20th May 2020, the Appellant lodged this Appeal.

Upon receipt of notification of the Appeal, the 1st Respondent raised a preliminary objection that the Appeal is incompetent for being initiated and signed by a person with no legal capacity to act on behalf of the Appellant. In that regard, the Appeals Authority was obliged to resolve the Preliminary Objection raised first before addressing the substantive appeal. The Appeals Authority decided to hear the arguments of the parties in both the preliminary objection and the merits of the appeal.

THE 1ST RESPONDENT'S SUBMISSIONS ON THE PRELIMINARY OBJECTION (PO)

The leading counsel for the 1st Respondent, Mr. Gabriel Malata, Deputy Solicitor General submitted that, the Appellant is a foreign legal entity incorporated under the laws of the United Arab Emirates (UAE). PPAA Form No.1 which has to be completed by a tenderer intending to lodge an appeal to this Authority must be signed by the legally authorized



representative. The Appellant is a corporate legal entity, thus the relevant Form ought to have been signed by the legally authorized representative. In order for a person to be considered as a legal representative, there should be an instrument which grants such authorization. The person who signed the Appellant's Statement of Appeal (PPAA Form No.1) one Mr. Ganapathy Lakshmanan lacked such an authority as there is no legal instrument such as a Board resolution which authorized him to do so.

The learned counsel further argued that, assuming that Mr. Ganapathy Lakshmanan used the Power of Attorney attached to the Appellant's tender as an authority to sign this Appeal, the said Power of Attorney only authorized him to sign tenders, related documents and agreements. The Power of Attorney has not authorized Mr. Ganapathy Lakshmanan to sign any document with regard to disputes in tribunals or courts. Thus, in the absence of a legally authorized representative, the Appeal has been initiated by a person who has no authority.

According to Article 11 of the Appellant's Memorandum of Association, the company's Chief Executive Officer has the authority to represent the company before ministries, departments, authorities, establishments and courts or tribunals. Thus, the Appeal could have been lodged by the Appellant's Chief Executive Officer or he could have nominated an employee on his behalf. The Appeal has been lodged by Mr. Ganapathy Lakshmanan who was given Power of Attorney by one Rashid Abdulla who has been identified as the Manager of the Appellant's company. There was no Board resolution which proves that Rashid Abdulla has been authorized

to appoint Mr. Ganapathy Lakshmanan to act on behalf of the Appellant in the disputed Tender. That means the Power of Attorney was not valid from the commencement of the Tender process.

Counsel for the 1st Respondent brought to the attention of the Appeals Authority various court decisions on the effect of having a Power of Attorney initiated by a wrong person. These include one by this Appeals Authority between **Samwarren Supplies International (T) Limited & Alliance Garment Industries Ltd (Sunflag Group of Companies)** versus **National Electoral Commission**, Appeal Case No. 03 of 2015-16. At page 18 paragraph 2 of the said decision it was stated that "*for a legal person to have a stand in any tribunal there has to be an instrument recognizing the one appearing on its behalf*". Counsel also cited the case of **Evarist Steven Swai and another versus the Trustees of Chama cha Mapinduzi and two others**, Land Case No. 147 of 2018, High Court of Tanzania, Land Division, at Dar es Salaam (unreported); **Tanzania Glue-Lam Industries Ltd and another versus Bjorn Schau and Four Others**, Commercial Case No. 103 of 2003, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported); and **Kenya Commercial Bank Ltd versus Stage Coach Management Ltd**, Civil Case No. 45 of 2012, High Court of Kenya, Milimani Commercial & Admiralty Division at Nairobi. The above cited cases emphasized the position that a person who acts on behalf of the company must have legal authorization to do so.

The learned counsel concluded his argument by indicating that the purported Power of Attorney was defective since the same was not registered as required by the law. Thus, he prayed for dismissal of the Appeal with costs.

The 2nd Respondent supported the arguments of the 1st Respondent in this regard.

REPLY BY THE APPELLANT ON THE PRELIMINARY OBJECTION

Counsel for the Appellant started his submission by indicating that, the 1st Respondent's Preliminary Objection (PO) does not qualify to be considered as a point of law. According to him a Preliminary Objection has to be a pure point of law which does not require any evidence. The PO raised requires evidence for it to be substantiated. In support of his argument the counsel cited the case of **Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd.** (1969) EA 696, where the legal principle that a preliminary objection must be a pure point of law was laid down.

Regarding authorization of representation through a Board resolution, counsel responded that, it is a settled principle that a resolution is not necessary for the company to file a case. In support of this argument he cited a case between **Investment House Ltd** versus **Webb Technologies (T) Limited and two others**, Commercial Case No. 97 of 2015, High Court of Tanzania, Commercial Division (unreported).

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Counsel for the Appellant further added that Section 189 of the Companies Act RE 2002 states in clear terms that the acts of managers and directors are valid. Thus, the argument that Article 11 of Memorandum of Association has vested powers of representation to the Chief Executive Officer is not valid. He submitted further that clauses of Memorandum of Association cannot contravene the requirement of the Companies Act.

With regard to the Power of Attorney, the counsel submitted that the same was valid and duly authorized Mr. Ganapathy Lakshmanan to handle all issues related to the Tender including signing of various documents. Since Mr. Ganapathy Lakshmanan was authorized to sign all the documents, signing of the Statement of Appeal was also proper as it falls within the documents related to the Tender.

The counsel concluded his argument by distinguishing all the cases cited by the 1st Respondent. He prayed that the preliminary objection be dismissed with costs.

In his brief rejoinder counsel for the 1st Respondent submitted that, the PO so raised qualifies since one of its principle is that it should be able to dispose of the matter. The PO raised is capable of doing so. The counsel added that Section 189 of the Companies Act relied upon by the Appellant is irrelevant since the Appellant's company has been incorporated in the United Arab Emirates (UAE). Thus, the contents of Article 11 of Memorandum of Association remain to be valid under the circumstances

and the Companies Act is not applicable. The counsel reiterated his prayer that the Appeal be dismissed.

ANALYSIS BY THE APPEALS AUTHORITY ON THE PRELIMINARY OBJECTION

The Appeals Authority took cognizance of the rival arguments by the parties in this regard and the authorities relied upon. The Appeals Authority is of the firm view that the legal position is as outlined in the case of **Mukisa Biscuits** (supra). A preliminary objection must raise a point of law based on ascertained facts and not evidence. Any alleged irregularity, defect or default must be apparent on the face of the application. Newbold, P. stated thus:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained".

We are of the firm view that, in order for the PO raised by the 1st Respondent to be substantiated some facts need to be ascertained. It is in respect of the legal standi of the person who lodged the Appeal on behalf of the Appellant. It is contended that his Power of Attorney was granted by a person who lacks authority to do so and was confined to matters related to the Tender and not to institute proceedings on behalf of the company. It is the Appeals Authority's considered view that the PO does not fall under



the position of the law as stated in **Mukisa Biscuit** (supra). The preliminary objection is incompetent and is accordingly overruled.

In view of the Appeals Authority's findings on the Preliminary Objection, the decision will be based on the merits of the appeal.

Before hearing the merits of the Appeal the following issues were agreed upon by the parties and approved by the Members of the Appeals Authority:-

- **Whether the disqualification of the Appellant's tender was justified;**
- **Whether award of the Tender to the 2nd Respondent is proper in law; and**
- **What reliefs, if any, are the parties entitled to.**

The parties' submissions on each of the agreed issues are summarized as follows:-

In relation to the first issue the Appellant started by submitting that, the evaluators of the Tender were incompetent as they ought to have noted all the anomalies of the Appellant's tender during evaluation. According to the Appellant's counsel the Notice of Intention to award indicated that the Appellant was disqualified for failure to attach Litigation Records. The Appellant challenged the reason given for its disqualification. To its surprise, the 1st Respondent's decision came with other shortfalls of its tender alleging that the same were noted during the review process. In this regard the 1st Respondent contravened the requirement of Section



96(2) of the Act as the mandate of the constituted review panel is to review the complaint and not to re-evaluate the tenders. The Appellant doubts the competence of evaluators as all shortfalls of its tender, if at all exists, would have been pointed out during evaluation process. Thus, evaluator's failure to do so entails that its capacity to carry out the assigned tasks were low.

The Appellant's counsel expounded his argument by stating that, the reasons advanced by the 1st Respondent on its decision were an afterthought after it had failed to find genuine reasons to disqualify the Appellant's tender. If the reasons contained in the 1st Respondent's decision were valid the same should have been contained in the notice of intention to award issued on 6th May 2020.

The Appellant's counsel submitted further that, the 1st Respondent's decision contradicts the notice of intention to award in that, while in the decision it admits that the Appellant's tender contained Litigation Records, the notice of intention to award indicated that such a declaration was not attached.

Regarding the 1st Respondent averment that Litigation Records were concealed as the Appellant has been involved in the litigation; the Appellant's counsel argued that such an observation contravenes Regulation 206(1) of the Regulations which strictly forbids a procuring entity from using extrinsic evidence in evaluating the tenders. The 1st Respondent's conduct in determining the Appellant's responsiveness, it had



not used the submitted information as per Regulation 203 of the Regulations, instead; it used other information from undisclosed source contrary to Regulation 206(1) Supra.

The Appellant's counsel expounded his argument by indicating that, his client did not conceal any information regarding Litigation Records. The cases which are relied upon by the 1st Respondent are not known to them and have been fabricated. The counsel urged the Appeals Authority not to consider them as it would amount to contravention of Section 18 of the Electronic Transactions Act No.13 of 2015.

The Appellant's counsel added that, if due diligence was conducted to the Appellant's tender then it was wrong for them to indicate in the notice of intention to award, that the Appellant's tender was disqualified at the technical evaluation stage.

In relation to the failure to comply with requirement of Anti-Bribery Policy, the counsel argued that, the 1st Respondent's decision on this point was irrational, unjustified and violated Section 4A of the Act as well as Regulation 4(2)(d) and 4(4) of the Regulations as amended for not being fair and transparent. The counsel expounded that, the 1st Respondent on page 2 paragraph 2 of its decision had indicated that the Appellant had attached Anti-Bribery Policy/Code of Conduct and Compliance Programme. Surprisingly, on the same decision the 1st Respondent concluded that the Appellant was found to have no such document. Due to these contradictions the Appellant doubt the validity of the award of the tender



as the 1st Respondent lacked probity as stipulated under Regulation 7(1) and (2) of the Regulations.

The Appellant's counsel considered another reason for the Appellant's disqualification that the submitted Power of Attorney lacked legal force as was granted by a person who is not among the owners or directors of the company and there was no board resolution to that effect. In response thereof, the counsel submitted that the daily operations of the company are not mandatorily under the hands of the directors. Thus, the 1st Respondent's finding in this regard is an indication of lack of knowledge on some legal issues related to companies operations. The signatory to the Power of Attorney in the Appellant's tender had mandate and was duly authorized to do so by the Appellant. The Counsel added that the Respondent had provided a defective format of Power of Attorney as the same was not as per Section 8 of the Notaries Public and Commissioners for Oath Act, Cap 12, RE 2002.

With regard to the second issue the Appellant's counsel submitted that, the award proposed to the 2nd Respondent is bad in law as is marred with irregularities due to drastic change of price. The 2nd Respondent had the highest price of TZS 18 Billion which has now been reduced to 14 Billion after negotiations. The Appellant failed to understand what kind of negotiations were conducted which reduced the bidding price by TZS 4 Billion if there was no re-scoping. The Appellant doubted the validity of negotiations as the same was unwarranted. Thus, it invited the Appeals Authority to verify its legitimacy.

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The Appellant's counsel added that the tender of the 2nd Respondent was not scrutinized in the same way as the Appellant's tender. The Appellant believes that if the same method was applied to scrutinize the Appellant's tender the 2nd Respondent's shortfalls would have been noted. Thus, due to the incompetence of evaluators the Appellant doubts the validity of award proposed to the 2nd Respondent.

Finally, the Appellant prayed for the following orders:-

- i. A declaration that the decision by the 1st Respondent to disqualify the Appellant is an afterthought;
 - ii. The decision by the 1st Respondent be halt and set aside;
 - iii. Declaration that the evaluation of the Tender was flawed by incompetent evaluators;
 - iv. Reduction of the 2nd Respondent's bid price be scrutinized by the Appeals Authority;
 - v. The award of the Tender be made to the Appellant for being compliant;
- Or in the alternative,
- vi. The award of the Tender to the 2nd Respondent be nullified and bids be evaluated afresh with an independent team from outside the 1st Respondent and award be made to the bidder who deserve the award;
 - vii. Costs of the Appeal; and
 - viii. Any other remedy the Appeals Authority shall deem just and fit to grant under the circumstances.

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Responding to the Appellant's argument on the first issue the 1st Respondent's counsel submitted that, the Appellant was disqualified from the Tender process for failure to attach Litigation Records as required by Clause 13 (d) of the TDS. According to him, Litigation Records are very important to be known to the procuring entity before the award in order to be aware of probable liabilities which may have resulted out of the litigation.

The Appellant was required to upload to the identified mark on the TANEPS system Litigation Records pursuant to Clause 13(d) of the TDS. The Appellant instead included a statement about its litigation status under Item 1.10 of the Form of Qualification Information which was uploaded together with the Form of Tender. The 1st Respondent expounded that upon scrutinizing the information provided under Item 1.10 of Form of Qualification Information it was realized that the same was false as the Appellant had litigation records in Kenya, Uganda, Malawi and Zambia. Specifically, the 1st Respondent indicated that the Appellant was involved in the case between **Al Ghurair Printing and Publishing LLC** versus **Coalition for Reforms for Democracy and two others**, Civil Appeal No. 63 of 2017, Court of Appeal of Kenya at Nairobi; **Independent Electoral and Boundaries Commission (IEBC) versus National Super Alliance (NASA) Kenya and six others**, Civil Appeal No. 224 of 2017, Court of Appeal of Kenya at Nairobi. The decisions were available on the eKLR and signed copies were availed to the Appeals Authority.

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Regarding the competence of evaluators, counsel for the 1st Respondent submitted that evaluation was carried out by a competent evaluation team which through their professionalism noted an anomaly which led to the Appellant's disqualification. The Appellant was notified of the reason for its disqualification and upon being dissatisfied lodged a complaint. In entertaining the Appellant's complaint the 1st Respondent invoked Regulation 106(3) of the Regulations by constituting a review team which reviewed the complaint. In the course of doing so other anomalies were found. It was observed that the Appellant's Power of Attorney was granted by a person who lacks authority to do so and was not signed by the donee, the uploaded Anti-Bribery Policy was in contravention of the requirement of the Tender Document. The counsel added that, all grounds for disqualification of the Appellant were tenable in law as were noted following a critical evaluation of the documents submitted by it.

The counsel for the 1st Respondent expounded that the evaluation process was conducted in accordance with the Act and its Regulations. The 1st Respondent had not contravened Section 96(2) of the Act and Regulations 203 and 206 as contended by the Appellant. The Appellant's tender was found to be non responsive during evaluation process and other anomalies were found during review of its complaint which was conducted as per Regulation 106(3) of the Regulations. The 1st Respondent added that during evaluation or review it is not restricted from invoking investigation of any information with a view of ascertaining its veracity.



With regard to the Power of Attorney, the 1st Respondent submitted that the Appellant's representative lacked capacity to act for and on behalf of the Appellant in the absence of the company resolution authorizing him to do so. The Appellant's representative lacks knowledge on how to run the company business.

In relation to the 2nd issue the 1st Respondent submitted that, the award proposed to the 2nd Respondent is valid as the change in the contract price resulted out of negotiation which was conducted pursuant to Regulation 225(g) of the Regulations as amended. The Appellant failed to substantiate how the reduction of bid price contravened the requirement of the law. The counsel concluded his argument by stating that, the Appellant's contention on this regard is mere speculations and lacks substantial proof.

Finally, the 1st Respondent prayed for the following orders;

- i. Dismissal of the Appeal with costs;
- ii. A declaration that the Appellant had failed to prove that it complied with Clause 13(d) of TDS;
- iii. The Appellant made false declaration in relation to litigation records;
- iv. The Appellant breached the law of the country; and
- v. The Appellant prayers are untenable in law.

Responding to the allegation raised against the proposed award to the 2nd Respondent, the counsel submitted that, award proposed to it is valid in the eyes of the law. The change on the proposed contract price had

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resulted out of negotiations which were conducted pursuant to Regulation 225(1)(f) of the Regulations (GN.No.446 of 2013) read together with its amendments No.72 of GN No. 333 of 2016.

Counsel submitted further that negotiations were conducted honestly, objectively, professionally and by a competent team which was appointed pursuant to Regulation 226 of the Regulations. Amongst the items negotiated were the reduction of price as the quoted one was beyond the market price. Three Items namely; Sample Tactile Ballot Papers, Tactile Ballot Papers and Ballot papers were slightly revised as a result the price was reduced from the TZS 18,085,226,628.10 to TZS 14,400,361,647.38. There was no re-scoping as alleged by the Appellant. The proposed contract price is exclusive of taxes and is under CIF Incoterm.

Finally, the 2nd Respondent prayed for the following reliefs:-

- i. A declaration that the decision made by the 1st Respondent to award the Tender to the 2nd Respondent be upheld and maintained;
- ii. A declaration that negotiation process of the Tender was just and made by competent negotiators; and
- iii. A declaration that the reduction of the 2nd Respondent's bid price was a result of objective and professional negotiations conducted between the 1st and the 2nd Respondents.



ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority's analysis is based on the issues agreed upon by the parties, the rival arguments of the parties, records uploaded on the TANEPS system and the law applicable.

1.0 Whether the disqualification of the Appellant's tender is justified;

In resolving this issue the Appeals Authority revisited the Evaluation Report obtained from the TANEPS system together with other relevant documents submitted by the parties. It was observed that the Appellant was disqualified at the technical evaluation stage for failure to attach Litigation Records. The said reason was also included in the notice of intention to award dated 6th May 2020.

During the hearing the Members of the Appeals Authority asked the Appellant to clarify if it had attached to its tender Litigation Records. In response thereof the Appellant stated that such records were attached. It added further that Item 1.10 of the Form of Qualification Information contained Litigation Records.

The Appeals Authority revisited the TANEPS system and observed that there were several evaluation criteria itemised in the system where tenderers were required to upload attachments in compliance with the requirement of the Tender Document. Amongst the evaluation criterion which was to be complied with was Clause 13(d) of TDS which was in *parimateria* with Clause 43 of the TDS. Clause 13(d) reads as follows:-



"The qualification criteria required from tenderers in ITT 13.3(b) is:

(d) Litigation records (if any)

*Indicate current litigation history indicating nature of dispute,
how resolved and status or outcome of litigation"*

(Emphasis supplied).

The above quoted provision states clearly that tenderers were mandatorily required to attach litigation records. The Appeals Authority revisited the Appellant's tender on the TANEPS system and observed that under criterion 13(d) where it was required to upload Litigation Records it uploaded Anti-Bribery Policy instead. Based on that, it is clear that the Appellant failed to comply with the requirement of the Tender Document.

The Appeals Authority also considered the parties' arguments in relation to the contents of Item 1.10 of the Appellant's Form of Qualification Information. On one hand the Appellant claimed that the information contained therein shows its litigation status. On the other hand the 1st Respondent denied that the information complies with the requirement of Clause 13(d) of the TDS. The 1st Respondent claimed further that the declaration is false and conceals the true position of the Appellant's litigation status.

The Appeals Authority revisited the Appellant's tender and observed that Item 1.10 of the Form of Qualification Information contained the following words:-

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"Nil (we have clean record of no litigation from the date of Incorporation. We have been supplying to various customers across the world including several UN organizations and Government bodies. We have delivered all jobs on time to the satisfaction of our customers. We have never been penalized on any of our contracts from World Bank/UN organizations)".

According to the above cited quotation, the Appeals Authority is of the view that the information contained therein indicates the Appellant's litigation status. The Appeals Authority is of the view that even if the information provided in Item 1.10 shows the Appellant's litigation status to be nil it ought to have indicated its true litigation record.

The Appeals Authority reviewed the two cases submitted by the 1st Respondent (cited above) as proof that the Appellant had a litigation history. In the course of reviewing them, it was observed that the Appellant was a party in both cases. During the hearing Members of the Appeals Authority asked the Appellant to substantiate if the two cases related to them. In response thereof, the Appellant denied any litigation record and claimed that the cited cases have been fabricated. According to counsel for the Appellant, in order for a firm to have a litigation history the disputes must arise out of the execution of a contract.

The Appeals Authority having reviewed the two cited cases which are public records is satisfied that the Appellant was involved in both cases. In the case of **Al Ghurair Printing and Publishing LLC** supra, the

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Appellant filed an Appeal challenging the decision of the High Court of Kenya which quashed award of Tender No. IEBC/01/2016-17 for the supply and delivery of ballot papers for elections, elections result declaration forms and poll registers made to it by Independent Electoral and Boundaries Commission (IEBC). In the **Independent Electoral and Boundaries Commission** case (supra), the Appellant was the 2nd Respondent whereby award made to it for the 2nd time on the same Tender No. IEBC/01/2016-17 was challenged. Thus, the Appellant was supposed to indicate the two cases in the litigation records. Despite the revelation of the existing Litigation records in respect of the above mentioned cases, the Appellant has continued to misrepresent the position on the existence of the said cases. The Appellant's act of denying the existence of the cases and the continuous misrepresentation of the status quo, clearly indicates that it intended to deceive the 1st Respondent. The Appeals Authority finds the Appellant's conduct in this regard to be improper.

From the above facts, the Appeals Authority finds the Respondent's act of disqualifying the Appellant for failure to comply with Clause 13(d) of the TDS to be proper and in accordance with Clause 28.3 of the ITT which reads as follows:-

*"The PE will confirm that the documents and information specified under ITT 11, 12 and 13 have been provided in the Tender. **If any of these documents or information is missing, or is not provided in accordance with the Instruction to Tenderers, the Tender shall be rejected**" (Emphasis added).*



Therefore, it is the Appeals Authority's firm view that the disqualification of the Appellant is justified. The Appeals Authority would not delve into other reasons which led to the Appellant's disqualifications. Thus, the Appeals Authority's conclusion with regard to the first issue is in the affirmative.

2.0 Whether award of the Tender to the 2nd Respondent is proper in law

In resolving this issue, the Appeals Authority considered the Appellant's argument that the proposal of award to the 2nd Respondent was not valid due to drastic change of contract price.

The Appeals Authority revisited the appeal record and observed that price quoted by the 2nd Respondent at the Tender Opening was TZS 18,085,226,628.10. However, the Notice of Intention to award indicated that the intended contract price is TZS 14,400,361,647.38 taxes exclusive.

The Appeals Authority observed further that the change in the contract price was caused by negotiations conducted between the 1st and the 2nd Respondents. Section 76(1) of the Act read together with Regulation 225(1)(g) of the Regulations as amended allow negotiations on various areas including reduction of price. Regulation 225(1)(g) reads as follows:-

"Negotiations may be undertaken with the lowest evaluated tenderer relating to-

*(g) **the reduction of price** in case of procurement of goods works or non-consultancy services"* (Emphasis supplied).

The Appeals Authority finds the change in price to be in order and therefore rejects the Appellant's argument in this regard. Therefore, the Appeals Authority concludes the 2nd issue in the affirmative.

3.0 What reliefs, if any, are the parties entitled to.

Taking cognizance of the findings hereinabove, that the disqualification of the Appellant was justified, the Appeals Authority hereby dismiss the Appeal. The 1st Respondent may proceed with the Tender process. Each party is to bear its own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

The Decision is delivered in the presence of the Appellant and the Respondents this 8th day of June 2020.


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HON. JUSTICE (rtd) SAUDA MJASIRI
CHAIRPERSON

MEMBERS:

- 1. ENG. STEPHEN MAKIGO**
- 2. ADV. ROSAN MBWAMBO**
- 3. CPA FREDRICK RUMANYIKA**